IN THE

SUPREME COURT

OF THE

UNITED STATES.

San Diego Land and Town Company, *Appellant,*	
v.	
City of National City et al., *Appellees.*	

APPELLANT'S BRIEF.

Statement.

This is an action brought by the appellant to set aside an ordinance of the trustees of the appellees, City of National City, establishing water rates to be charged by the appellant. Evidence was taken and the case decided on its merits, the court holding that the ordinance allowed such rates as would return to the appellant a reasonable amount on the value of the plant; that the present value, and not the cost, should be taken as the basis of fixing rates; that the amount of bonds issued by the company in the construction of its plant was immaterial, and that

the bondholders of the company were not entitled to protection on the basis of the amount loaned by them and invested in the plant, but must bear any loss resulting from the depreciation of the plant in value, from use or otherwise.

See opinion Record, p. 30, San Diego Land and Town Company *v.* National City, 74 Fed. Rep. 79.

The point was also made and urged upon the court that the constitution and laws of the state of California relating to the fixing of water rates are in violation of the constitution of the United States.

This question was not ruled upon by the court at all, but it was held that the complainant, a foreign corporation, having come into the state and acquired rights under its constitution could not be heard to claim that the state constitution was in violation of the constitution of the United States.

Record pp. 30, 32, 74 Fed. Rep. 79, 81.

The following errors are assigned:

I.

The Circuit Court of the United States, ninth circuit, southern district of California, erred in considering as a part of the evidence in this suit all testimony and evidence offered to prove the enhancement of the value of the appellant's lands by the construction of the water plant and system mentioned in the bill of complaint herein, and of the revenue derived from the sales of its lands.

II.

Said court erred in considering evidence taken in the action tending to show that the plant of the appellant could, at the time of the trial, have been duplicated for less than its original and actual cost.

III.

Said court erred in receiving and considering evidence showing that the time for meetings of the board of trustees of National City was fixed by law.

IV.

All of the evidence above mentioned was, and is, immaterial and irrelevant, and should not have been considered by said court, and should not be considered by this court on appeal.

V.

The said Circuit Court erred in not passing upon and deciding the question put in issue in the action, whether section 1 of article XIV of the constitution of the state of California, and statutes enacted in pursuance thereof, are not in violation of the constitution of the United States.

VI.

Said Circuit Court erred in holding that the appellant could not be heard to question the constitutionality of the laws of California because it "came into the state of California and acquired the water and water rights which form the basis of its suit under and by virtue of laws passed pursuant to that provision of the constitution of the state, which it now seeks to assail, as being contrary to the provisions of the constitution of the United States."

VII.

Said Circuit Court erred in its holding that in determining whether the rates in controversy were just and reasonable rates for furnishing water to consumers, the present value, and not the actual and reasonable cost of the appellant's plant, should be considered.

VIII.

Said Circuit Court erred in its holding that the appellant has no legal right to charge any compensation for a "water right;" that it can be compelled by law to supply water to the lands of any consumer demanding it, thereby vesting in him a perpetual right to the flow and use of water for purposes of irrigation without compensation.

IX.

Said Circuit Court erred in holding that there is no such thing under the laws of the state of California as a water right, and that no charge can be made therefor.

X.

Said Circuit Court erred in its holding and conclusion that the right of eminent domain, or the right to appropriate the waters of the streams in the state of California, or the franchise to sell or dispose of or distribute the water appropriated, was vested in the appellant by the constitution of the state of California, or that the appellant accepted or received any benefit from such constitution.

XI.

Said Circuit Court erred in its holding that the appellant had, or could have received or accepted, any benefits under the constitution or laws of the state of California, or that by reason of the acceptance of any such benefits it was or could be charged with any corresponding burden, and particularly with the burden of supplying water to consumers in any such way as to vest such consumers with a perpetual water right appurtenant to their lands without compensation.

XII.

Said Circuit Court erred in holding that the net income of the appellant from its water department for the year 1894, was $7850.18; for the year 1893, $13,160.58; for the year 1892, $7547.93, and for the year 1891, $4449.27, or that the appellant received any net profits from its said department.

XIII.

The said Circuit Court erred in holding that for the appellant's profits or losses incurred in furnishing water to consumers, such consumers of water within National City are not responsible, and that "such losses, if any such have been sustained, must be borne by the complainant (appellant), as best it can, like all other companies and individuals who embark in undertakings whose realization does not come up to their expectations and hopes."

XIV.

The said Circuit Court erred in holding that the rates established by the ordinance complained of will yield a fair interest on that portion of the value of the property or plant or the appellant embraced within National City.

XV.

The said Circuit Court erred in holding that it was immaterial that the complainant (appellant), in the construction of its plant and carrying on its work, borrowed $300,000 and issued its bonds therefor, and that a borrower of money on such bonds, like a borrower of money on a mortgage, does so with his eyes open, and must take the chances that everybody must take who engages in business transactions.

XVI.

The said Circuit Court erred in dismissing the appellant's bill.

XVII.

The constitution and statutes of the state of California, providing for the fixing of rates, for furnishing water to cities and towns and their inhabitants by the common councils or other governing bodies of such cities or towns are in violation of the constitution of the United States, and therefore void, and the said Circuit Court erred in not so holding.

The errors assigned, so far as we desire to discuss them, will be taken up separately.

Argument.

I.

THE CONSTITUTION AND STATUTES OF THE STATE OF CALIFORNIA ARE IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

It is useless to contend against the doctrine that the power to limit the charges that shall be made for water sold by a corporation like the complainant exists in the state, and may be exercised and enforced, if done in the proper manner. This right has been too often upheld by the courts to admit of question at the present day.

But it does not follow, by any means, that every constitutional or statutory provision of a state authorizing the exercise of the right and providing the manner of its exercise, must or will be upheld by the courts. The *right* to the use of water, as well as the water itself, when actually appropriated and taken from the natural channel of the stream from which it is diverted, is *property*, and both are subjects of sale and transfer, in the manner and under the restrictions prescribed by law, and subject to the doctrine that it is a public use.

The constitution of the United States provides, in express terms, that no state shall deprive any person of life, liberty or property, *without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws.

Const. U. S. Amd., Art. 14, Sec. 1.

It has been held that the words "due process of law" were intended to convey the same meaning as the words "by the law of the land," in magna charta.

Bank of the State *v.* Cooper, 24 Am. Dec. 517, 537, note.

And "law of the land" has been defined as "*a general and public law*, equally binding upon every member of the com-

munity; and as a law which embraces all persons who are or may come into like situation and circumstances."

Dibrell *v.* Morris, 15 S. W. Rep. 87, 92.

And it is universally held, that in order to constitute due process of law, notice in some form must be given to the party to be affected.

Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. Rep. 658;
Staurt *v.* Palmer, 74 N. Y. 183, 191, 30 Am. Rep. 289;
Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474;
Hutson *v.* Protectional Dist., 79 Cal. 90;
Railroad Tax Cases, 13 Fed. Rep. 722, 750;
Ulman *v.* Mayor, Etc. of Baltimore, 72 Md. 587, 20 Atl. Rep. 141;
Works, Jurisdiction, Sec. 33, p. 206.

And that after notice, the party must have an opportunity to be heard.

Windsor *v.* McVeigh, 93 U. S. 274;
Bank of the State *v.* Cooper, 24 Am. Dec. 517, 538, note;
Stuart *v.* Palmer, 74 N. Y. 183, 191; 30 Am. Rep. 289;
Mercantile Trust Co. *v.* Texas, Etc., Ry. Co., 51 Fed. Rep. 527.

Nor is it enough that a party have notice. There must be some law authorizing it. Notice not authorized by law is no notice.

Kuntz *v.* Sumption, 117 Ind.; 19 N. E. Rep. 474.

The constitution of California authorizes a subordinate body in every city and county in the state to declare, by an ordinance, *or otherwise*, what amount a water company doing business within such county or city shall charge and receive for the water it supplies to consumers. The constitution itself does not seem to contemplate any notice to the party thus to be affected, nor does it provide for any hearing or any means of arriving at what rates ought to be charged.

As affecting the supply of water in cities there is no "general and public law," providing for such notice or hearing, or any proceeding by which the reasonable rates to be charged shall be arrived at.

The constitution does not even fix the time when the rates shall be fixed, nearer than that it shall be during the

month of February, nor does it provide the manner in which they shall be fixed. It may be by ordinance *or otherwise*.

In case of boards of supervisors there is a statute which requires a petition to be filed, notice, and hearing, which brings it within the requirements of the constitution of the United States.

Stat. 1885, p. 95; Civil Code Cal., p. 140, note.

But there is no such provision affecting city authorities. So far, therefore, as respects persons or corporations disposing of water within the limits of any town or city, the price at which they shall sell the water may be fixed by the city or town authorities by ordinance *or otherwise*, arbitrarily, without notice or hearing. And the penalty imposed upon such person or corporation, if it sells the water for a higher price than that so fixed, is a forfeiture of its property and franchises to such city or town.

Const. Cal. Art. XIV, Sec. 1.

Is this "due process of law?"

We respectfully submit that it is not, and that the authorities are uniformly against the validity of such a proceeding.

Windsor *v.* McVeigh, 93 U. S. 274;

Works, Jurisdiction, Sec. 33, p. 206, and cases cited.

Besides being against the plain letter of the constitution, it is so utterly arbitrary and unjust as to shock the reason and conscience. It allows the purchasers of water, through their own representatives, to say what they will pay. The other party in interest is given no right to protest or be heard. No appeal is given or resort to any judicial tribunal authorized. The conclusion reached is not made subject to review anywhere or in any form. In short, no more arbitrary or unjust proceeding was ever conceived, much less authorized by the fundamental law of an enlightened state, with a constitutional provision as liberal as that or the federal constitution, in defense of the property rights of its citizens.

It is not necessary, in all cases, that resort to the courts shall be had to assert the rights of the public against the individual.

But whatever may be the course of proceeding, whether it be in court or by some other authorized body, there must be

provision for notice and an ultimate right to resort to the courts for protection, if the proceeding is unlawful or the burden imposed by it unauthorized or illegal.

McMillen *v.* Anderson, 95 U. S. 37;
Davidson *v.* New Orleans, 96 U. S. 97.

This court has declined to define "due process of law." But in the case of Davidson *v.* New Orleans, 96 U. S. 97, that court has stated in plain and distinct terms what will amount to "due process of law," as follows:

"Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public, whether it be for the whole state or some more limited portion of the community, *and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Leaving it to be understood that if such notice and right to be heard is not given, the taking is without due process of law. The proceedings authorizing the fixing of water rates is wholly without any of the elements thus held to constitute due process of law.

It may be claimed that this is not a judicial proceeding, and that, therefore, the provision of the constitution is not applicable. But it has been distinctly held that the article is "a restraint upon the *legislative*, as well as of the *executive* and *judicial* powers of the government."

Murray *v.* Improvement Co., 18 How. 272–276;
Ex parte Ulrich, 42 Fed. Rep. 587;
City of Buffalo *v.* Chadeayne, 7 N. Y. Supl. 501;
Works, Jurisdiction, Sec. 33, p. 206.

And whether the wrong consists in the passage of a law violating the constitutional guaranty, or in its enforcement, the rule must be the same. If the enactment of an ordinance by the city authorities is a *legislative*, and not a judicial act, it is one exercised by virtue of an illegal enactment by the law making power of the state, which allows the subordinate legislative body to fix arbitrarily, the price for which a citizen shall part with his property to another citizen. And whether the act of thus fixing the rates is legislative or judicial, the wrong committed and the

result to the property owner are precisely the same, and equally, and for the same reasons, within the spirit and letter of the constitutional inhibition.

Stuart *v.* Palmer, 74 N. Y. 190; 30 Am. Rep. 289;
Chauvin *v.* Valiton, 8 Mont. 451; 20 Pac. Rep. 658;
City of Buffalo *v.* Chadeayne, 7 N. Y. Supl. 501;
People *v.* O'Brien, 111 N. Y. 62; 18 N. E. Rep. 692;
Railroad Tax Cases, 13 Fed. Rep. 722, 748;
Cohen *v.* Wright, 22 Cal. 293, 318;
Murdock *v.* City of Cincinnati, 39 Fed. Rep. 891;
Scott *v.* City of Toledo, 36 Fed. Rep. 385.

Legislative enactments fixing maximum rates of charges by railroad and other *quasi* public corporations have been upheld. These are "general and public laws, equally binding upon every member of the community," and "embrace all persons who are or may come into like situation and circumstances."

Being so, it is not subject to the objection that it does not affect all alike. But the law under consideration is not of that nature. The price that should be charged for water must necessarily differ in different localities. What would be a reasonable compensation depends upon many circumstances, notably, the means of developing the water, the distance it must be carried, and the expense and value of the plant of the particular person or corporation to be affected.

And instead of fixing a uniform rate, which would manifestly be impossible, the local authorities of counties, towns and cities are authorized to fix the rates. There is a manifest difference, it seems to us, between a law of this kind and one by which the legislature fixes a uniform rate. The fact that power to fix the rate is thus delegated to such subordinate bodies, implies that an investigation is necessary in each case, and that the exercise of judgment and discretion is called for in each. If so, the party to be affected is clearly entitled, under all the authorities, to be heard at the investigation thus called for and made necessary.

Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474.

And this law is amenable to the further objection that it provides no basis upon which rates shall be fixed. The constitution does nothing more than to authorize the fixing of the rates, requiring that this shall be done during the month of

February of each year, and imposing a penalty of forfeiture upon a corporation for charging a higher rate.

Const. Cal. Art. XIV, Sec. I.

There is a statute of the state requiring corporations dealing in water to furnish a detailed statement of receipts and expenditures.

Stat. Cal. 1881, p. 54; Civil Code, p. 137.

But it is nowhere provided that the statement so furnished shall be the basis of the rates to be fixed, nor is there any provision as to what shall be reasonable rates or what percentage upon its investment shall be allowed the corporation, or what compensation it shall be awarded. This is left wholly to the unguided and unlimited discretion of the common council or board of trustees of each city and town in the state. Such a law is void for uncertainty and want of uniformity throughout the state.

Louisville & N. R. Co. *v.* Railroad Co., 19 Fed. Rep. 678.

This objection is obviated where rates are fixed by boards of supervisors, outside of city or town limits, by the requirement of a petition and notice, and the provision that the person or corporation furnishing water shall be allowed not less than six, nor more than eighteen per cent. per annum, upon the value of its property used in furnishing water.

Stat. 1885, p. 95, Sec. 5; Civil Code p. 140.

If the right to fix the rates is an arbitrary one, or is one of pure discretion, not calling for an investigation, the taking of evidence, or the exercise of judgment, the rule is different, and notice and hearing is unnecessary.

Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474.

That the duty to be performed in fixing rates is judicial is apparent from the nature of the duty, and this court has said in terms:

"Like every other tribunal established by the legislature for such a purpose, *their duties are judicial in their nature*, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination."

Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 354; 4 Sup. Ct. Rep. 48, 51;

Railway Co. *v.* Minnesota, 134 U. S. 118; 10 Sup. Ct. Rep. 462.

But the case of Railway Co. *v.* Minnesota stands as the law of this case today, and is absolutely conclusive of this question. There the Supreme Court of Minnesota had held that the action of commissioners fixing rates was conclusive. There was no provision in the statute under which they acted for notice or a judicial hearing. In passing upon the question the court, speaking through Mr. Justice Blatchford, used this language:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive, and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission 'shall declare to be equal and reasonable;' and, to that end, it is required to inform the company in writing in what respect, its charges are unequal and unreasonable. *No hearing is provided for; no summons or notice to the company before the commission has found what it is to declare; no opportunity provided for the company to introduce witnesses before the com-*

mission----in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it, by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at. By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself without due process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In the later case of Budd *v.* People, *supra*, the case of Railway Co. *v.* Minnesota was distinguished from Munn *v.* Illinois and other cases following it, and the conclusion reached in the former case was left undisturbed.

See also Richmond & D. R. Co. *v.* Trammel, 53 Fed. Rep. 196;

Mercantile Trust Co. *v.* Texas & P. Ry. Co., 51 Fed. Rep. 529;

Reagan *v.* Farmer's Loan & Trust Co. 154 U. S. 362, 388.

Applying the rule established by this case to the constitution of California, as construed by the Supreme Court of the state in Spring Valley Water Works *v.* San Francisco, 82 Cal. 286, the provisions of the constitution cannot be upheld. It was there held that no notice is required to be given to persons or corporations to be affected by the fixing of rates; that the constitution provides for the fixing of *reasonable* rates, and that the rates fixed by the city authorities could not be set aside, except upon a showing of actual fraud, or that the rates were so grossly unreasonable and unjust as to amount to the same thing.

In passing upon these questions the court said:

"The constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just, is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. *There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing.*

* * * * * * * * * * * * *

"On the part of the respondent it is contended, in support of the decision of the court below, that notice to the plaintiff of an intention to fix the rates was necessary, and that without such notice being given, the action of the board was a taking of its property without due process of law. But the constitution is self executing, and as it does not require notice, we think no notice was necessary."

Here is a direct and unequivocal holding that under the state constitution no notice was necessary.

With this construction of the constitution and laws of California we are brought directly within the reasoning and conclusion of Railway Co. *v.* Minnesota. No notice or hearing is provided for, and the court holds that none is necessary under the constitution of the state. And according to this construction, which is binding on the federal courts, there can be no review of the decision of the city authorities. The decision, made without notice or hearing, is conclusive, except upon a showing of fraud, which will always defeat and set aside the action of any tribunal, whether it be a court or not.

These later decisions of this court clearly establish the unconstitutionality of laws like the one under consideration. Under such laws uniformity of procedure, or of rates fixed, is impossible. One body may proceed without notice or hearing, another may take an entirely different course. And whatever the proceeding may be, rates may and usually are different in every town and city in the state, and that without any reference to differences in circumstances affecting the justice of the rates fixed.

Louisville & N. R. Co. *v.* Railroad Com., 19 Fed. Rep. 678.

The case of Spring Valley Water Works *v.* Schottler, 110 U. S. 347, was a case arising under the present constitution of Cal-

ifornia. There are some general observations in the opinion in that case as to the right of the state to control the rates to be charged for water. This, as we have conceded, is undeniable. But that case did not involve the question presented here. We are now considering, not whether the state may fix the rates, but *how* they shall be fixed. There is nothing in the Schottler case that conflicts with the later case of Railway Co. *v.* Minnesota, but if there were, it must give way to the later decision.

II.

THE COMPLAINANT WAS ENTITLED TO BE HEARD ON THE QUESTION OF THE CONSTITUTIONALITY OF THE STATE LAWS.

The court below declined to pass upon this constitutional question, upon the ground that the complainant could not be heard to raise the question. This was a point not made by opposing counsel, but was first presented in the opinion, and we had no opportunity to present our views upon it in the Circuit Court. In his opinion the learned judge says:

"In Spring Valley Waterworks *v.* City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, the Supreme Court of California held that this provision of the constitution of the state did not contemplate or require notice to be given to persons or corporations to be affected by the fixing of the water rates to be charged by them. Whether that provision of the constitution of California, as thus construed by the highest court of the state, would deny to a person or corporation supplying the people of a municipality with water acquired prior to the adoption of the provision the protection secured by the constitution of the United States, need not be decided or considered. In the present case the complainant came into the state of California and acquired the water and water rights which form the basis of its suit under and by virtue of laws passed pursuant to that provision of the constitution of the state which it now seeks to assail as being contrary to the provisions of the constitution of the United States. To permit the complainant to do this would, in effect, be to permit it to rely upon the constitution and laws of California as a valid basis for the acquisition of its asserted rights, and at the same time to treat as void the same provisions where they impose a burden in connection with those rights. The complainant cannot be permitted to thus blow hot and cold in the same breath. If it was not willing to subject itself to the burden imposed by the constitution and laws of California upon all persons and corporations appropriating water in the state for distribution and sale, it should not have come, as it did, into the state and availed itself of the rights of appropriation conferred by the same constitution and laws. Taking those benefits, it assumed the corresponding burden, and will not be heard to assert the one and repudiate the other."

No authority is referred to as supporting the proposition that a citizen of another state cannot come into this state and

take the benefits of such of its laws as are valid and constitutional without estopping him from protecting himself, under the supreme law, from the effects of other of its laws that are in violation of the federal constitution. This, it seems to us, is a most remarkable proposition. We had supposed that a citizen of any state in the union could invoke the protection of the constitution, wherever he might be, against a law that is violative of that constitution. A law that is in violation of the federal constitution is no law, but is void everywhere. No rights can be acquired under it, nor can it have the effect to deprive a citizen of any of his right.

But in order to reach this conclusion the judge of the Circuit Court has assumed something that does not in fact exist, viz., that the appellant has acquired some rights under the constitution of California and the laws enacted under it. What right has it acquired under this constitution or any statute enacted under it. The constitutional provision confers no rights whatever upon any corporation or person, nor can any rights be acquired under it. On the contrary, the provision and the statutes that have been enacted to put it in force are, and were intended to be, limitations and restrictions upon rights already existing independently of them. The right to appropriate the waters of a stream, if that is what the learned judge refers to, and we suppose it is, was not given by the constitution, but existed long before the constitution was adopted. It was a right that existed independently of any statute. But, in the early history of the state, statutes were enacted regulating the use of water so appropriated. We maintain that so far as any question in this suit is concerned, the constitution and laws enacted under it, have no effect whatever upon the rights of the complainant, except as limitations upon its rights acquired independently of and without reference to or aid from the constitution. The right to the water flowing in the natural streams of the state was as much a public use before the constitution of the state was adopted as it is now. So much of the constitution as declares it to be so is a mere constitutional declaration of a rule of law, and a right already existing. It is so declared as a basis for what follows. What follows are provisions for fixing the rates to be charged for water furnished. It applies to all waters whether appropriated before or after the adoption of the constitution.

Constitution of California, Art. XIV, Secs. 1 and 2.

As to water furnished outside of cities and towns a statute was enacted giving effect to the constitution and providing a means of establishing water rates.

Stat. of Cal. 1885, page 95.

But long before this constitutional provision took effect, which was July 4, 1879, the right to appropriate water existed as fully as it does under the constitution. The constitution does nothing more than to throw certain safe-guards around the use of the water after it has been appropriated. This was done by statute as early as 1862, and the right was then given to corporations to appropriate water and construct canals and other works for the distribution thereof.

Stat. of Cal. 1862, page 540.

This statute section 3 also gave the right to collect water rents and rates.

Still later, when the codes were adopted, in 1873, further provision was made protecting and guaranteeing the rights of persons receiving water from such corporations.

Civil Code of Cal. Sec. 552.

Now, in view of these existing laws, giving all corporations the right to appropriate and sell water, upon what theory can it justly be held that when such a right has been acquired a corporation is estopped to maintain that a constitutional provision authorizing the taking of the property thus acquired without notice or hearing, and therefore without due process of law, is void because it does just what the federal constitution, the paramount law, forbids. We think we have shown that the complainant acquired, and could acquire no rights under the constitutional provision in question, and that, for that reason the conclusion reached by the Circuit Court is erroneous. But suppose we are wrong in this contention. We maintain that the conclusion reached is none the less erroneous.

Of course, where one acquires rights under and by virtue of a constitution, or statute, he takes it under and subject to all of the limitations and restrictions contained in the law under which he acquires such rights, *provided the limitations are valid and constitutional.* But if the limitations and restrictions are unconstitutional and void they are not limitations at all and cannot affect his rights. A citizen of another state has the right to acquire property interests in this state, and when he

does so he has the right to assume that the federal constitution will protect him and to act upon the assumption that his rights cannot be affected by a state law that is void because it violates the federal constitution.

Let us go a step further: Suppose we concede, for the purpose of the argument, that the learned judge of the Circuit Court is right, that one cannot claim under one part of a law and at the same time be heard to claim that another part of the law that limits and restricts that right is unconstitutional and void. Has the complainant done anything of that kind here? We maintain that it has not. We make no claim that the state cannot regulate and control the right to the use distribution and sale of the water the complainant has appropriated. Our claim is that if the state assumes to regulate its sale of water, it must do so in a lawful way. If it undertakes to determine, through the common council of a city, the price at which the company shall distribute and sell its water, it must do so in a way not prohibited by the federal constitution; that it cannot do so without notice and hearing, because the constitution of the United States says it shall not, and that a law of the state which authorizes such a proceeding, without notice and a hearing, is void, because in violation of the constitution. We submit that the right of a citizen to appeal to the federal constitution as a protection against the taking of his property without due process of law, cannot be waived in any such way, if it can be waived at all. And certainly the mere fact that a citizen of another state acquires property in this state while such a law is in existence, or on the statute books, cannot amount to such a waiver, as held in this case.

III.

IN WAS ERROR TO HOLD THAT THERE IS NO SUCH THING AS A WATER RIGHT, AND NO CHARGE COULD BE MADE THEREFOR.

The court holds, broadly, and without qualification, that no such thing as a water right exists or can exist under the provisions of the state constitution. It was a startling decision. That such a water right did exist, and that sales thereof might be made by corporations or others engaged in the distribution of water, had been recognized and acted upon throughout the state from the beginning. Thousands of such sales and contracts, therefore, had been made, and millions of dollars had been paid

and promised to be paid for such water rights. The Supreme Court of the state had, in a number of decided cases, recognized the existence and salable quality of such water rights, and enforced contracts made therefor. This being so, this decision, the first of its kind, was something of a surprise, it must be confessed. And we shall endeavor to show that this departure from what we claim to be the well settled law of the state, recognized and enforced by its courts, finds no support in any provision of the state constitution or statutes, and is opposed by the laws of the state as construed by its own courts.

It may be well, at the outset, to ascertain, if we can, what a water right is under the laws of this state. The code provides:

"Whenever any corporation organized under the laws of this state furnishes water to irrigate lands which said corporation has sold, *the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold at such rates as may be established by said corporation in pursuance of law.* And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation has been furnished water by it, with which to irrigate his land, such person *shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.*"

Code Civil Pro., Cal., Sec. 552.

This section of the code clearly defines what a water right is, when based upon the right to receive water from the water system of a corporation supplying water to consumers. It is the right to the continued and perpetual use of the water upon the land to which it has been once supplied *upon payment of the rates therefor established by the company.*

But this right has been further protected by the constitution and later statutory enactments.

The constitution provides amongst other things:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be provided by law."

Const. Cal., Art. XIV, Sec. 1.

And again:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Const. Cal., Art. XIV, Sec. 2.

Thus it will be seen that the *water right* still remains, but it is made more valuable in that the rates to be paid for the water annually, instead of being established by the company, as provided by the code, and which must be paid as a condition upon which the continued use of the water may be demanded, may be fixed by the public authorities, as provided by law. It provides a complete remedy, if the company shall impose an unreasonable or extortionate annual rate for the water used. This provision of the constitution has been made effective by the enactment of a statute authorizing boards of supervisors of counties to fix and establish the rates on petition of twenty-five citizens.

Stat. 1885, pp. 95–98.

Thus the valuable right to the perpetual flow and use of water upon one's land may, in this way, be acquired by the water being once furnished and made appurtenant to the land, and this right is enhanced in value by the guarantee of the constitution and statute referred to, that only such rates as are fixed as provided by law can be charged therefor. It seems to us that a water right is thus fixed and determined by the express provisions of the law.

Having shown what a water right is, the next and only question under this branch of the case is, Can a property owner legally contract with a corporation for this water right, and bind himself to pay a consideration therefor?

The learned judge of the circuit court has held that he cannot.

The question of the right to make a contract for a water right must not be confounded with the right to fix the annual rates for the water actually used by the consumer. It must be conceded that the annual rates cannot be so fixed, because the constitution provides that the manner of fixing such rates shall be provided by law, and by the statute of 1885, above referred to, the manner of fixing such rates outside of cities and towns is expressly laid down, and the constitution provides how rates shall be fixed within cities and towns. But there is no statute or constitutional provision prohibiting the parties in interest from contracting for the perpetual and preferred right to have a share of the water at the rates established in the manner provided by law.

Is this preferred right a valuable one? Certainly it is. So much so that it is preserved to the party who once obtains it by the provision of the code.

Civil Code of Cal., Sec. 552.

That it is regarded by the law and law makers as a valuable right cannot, therefore, be denied. Is it so in a practical as well as in a legal sense? The facts presented in this suit will answer the question. Here is a water company having a system that will furnish, according to the evidence, in the neighborhood of six thousand acres of land, which is about one-half of the land under the system and needing water. The law is well settled, and the Circuit Court has so decided, that a property owner, having acquired a water right to water to be furnished from the system, may, by injunction, prevent the company from selling or otherwise vesting in others, any right to water in excess of the amount it can supply.

In other words, the acquisition of a water right gives its owner a preferred right as against every one acquiring a subsequent right from the ditch, flume, or pipe line of the company, the same as if they were takers or appropriators of water from a natural stream. This being so, why cannot the property owner, who desires to acquire the preferred right to the water, *buy* that right and bind himself for the purchase price? And why the company may not sell this right that has been created by the expenditure of labor and money on its part to bring it to the land owner's property, we must say, with all respect to the opinion of the learned judge of the Circuit Court, which we know is entitled to great consideration, we have never been able to see. In the present case, the appellant was unable to supply water to all of the lands for which it might be needed. A very large part of the land must go without water. The company had expended over a million dollars in storing and providing means to carry the water.

Now, under the code provision above cited, the moment a water consumer voluntarily applied the water to his lands it became appurtenant thereto, and the company could never deprive him of the use of the water at the rate established as provided by law. This being so, unless the company could charge a reasonable sum for the preferred right to the water, it must be compelled to give away this valuable right, and be

subject to injunction to prevent either the sale of a water right or water to others in such way as to affect this right so obtained.

But this is not an open question in this state. The Supreme Court of the state has expressly held that a contract of this kind is valid and binding, and that the amount agreed to be paid for a water right, may, by the terms of the agreement, be made a lien upon the land to which the water is supplied.

Fresno Canal Co. *v.* Rowell, 80 Cal. 114;
Fresno Canal Co. *v.* Dunbar, 80 Cal. 530;
San Diego Flume Co. *v.* Chase, 87 Cal. 561;
Clyne *v.* Benicia Water Co., 100 Cal. 310.

There is therefore a direct and irreconcilable conflict in the decisions of the highest court in the state and the Circuit Court.

We understand the rule to be well settled that the federal courts will follow the decisions of the state court affecting and construing state laws.

Forepaugh *v.* Delaware, etc., R. Co., 5 Law. Rep. Ann. 508;
Walker *v.* State Harbor Comrs., 17 Wall. 648;
Bucher *v.* Cheshire R. Co., 125 U. S. 555;
Town of Enfield *v.* Jordan, 119 U. S. 680;
South Branch Lumber Co. *v.* Ott, 124 U. S. 620.

That such contracts may be made and enforced by companies, and their consumers, has become the settled law of this state, thousands of such water right contracts have been made and are in force all over the state of California, and millions of dollars have been expended on the faith of the right to make such contracts and secure them by making them liens upon the land to which the water is made appurtenant as the Supreme Court of the state has held may be done. And for this reason, if for no other, the federal courts will follow the decisions of the state court.

Burgess *v.* Seligman, 107 U. S. 20;
Gage *v.* Pumpelly, 115 U. S. 454.

The constitution of the state has nothing whatever to do with a water right or the price that shall be paid for it. It simply provides for fixing the *annual rental* to be paid for the water furnished and used. When one obtains his water right

by purchase or otherwise, he has a right to demand that the water shall be furnished to his lands at the price fixed, as provided by law, and that the company shall exact no more. But he must first acquire the right to have the water on such terms. Whether in fixing the annual rates to be charged, the body authorized to fix them can take into account the amount that has been received by the company for water rights, is another question and one that is not presented in this case. Nor is any question raised as to what would be a reasonable amount to exact for a water right, or whether the courts can interfere to determine what is a reasonable amount to charge therefor. The unqualified holding here is that there can be no such thing as a water right under our constitution and any contract made for such right is invalid.

We submit that nothing in the constitution gives any warrant for any such conclusion and that all of the decided cases in this state are directly against it.

IV.

WHAT SHOULD BE TAKEN AS THE VALUE UPON WHICH RATES SHOULD BE ALLOWED.

This is a question that has given rise to much difference of opinion in the minds of courts and judges. Shall the amount actually expended by the company for the public benefit be taken as the basis, or the present value of the plant, or the amount it would cost to replace the plant new at the time the rates are fixed. The diversity of opinion on this important question, of such vital interest to those who have invested their money in enterprises of this kind, is exemplified by a late decision on the subject by the Supreme Court of the state of California.

San Diego Water Co. *v.* San Diego, 118 Cal. 556.

Three of the justices concurred in an opinion holding that the company was entitled to a reasonable return on the amount reasonably and necessarily expended for the public benefit in constructing its water system.

118 Cal. pp. 567-571.

In closing the discussion on this branch of the case the court said:

"What that standard is, as applied to the present case, we think not difficult of ascertainment. As we have said, it is not the

water or the distributing works which the company may be said to own, and the value of which is to be ascertained. They were acquired and contributed for the use of the public; the public may be said to be the real owner, and the company only the agent of the public to administer their use. What the company has parted with, what the public has acquired, is the money reasonably and properly expended by the company in acquiring its property and constructing its works. The state has taken the use of that money, and it is for that use that it must provide just compensation. What revenue money is capable of producing is a question of fact, and, theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demand for the product of the enterprise. It would not, of course, be reasonable to allow the company a profit equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered. An important circumstance will always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always conclusive criterion of the rate of profit which will be deemed reasonable. In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and, even then, some allowance or margin should be made for any risk to which the company may be exposed, over and above the risk taken by a lender."

We respectfully call to the attention of this court the reasoning in full upon this subject in this opinion.

In this same case the chief justice, in a separate opinion, holds that the present *actual* value of the plant shall be taken as the basis for fixing rates, and that net revenue, equal to the lowest current rate of interest, should be provided. And that in addition, a sinking fund should be allowed sufficient to make good the natural depreciation of the perishable portion of the system. [118 Cal. page 588.]

A comparison of the two opinions, and the conclusions reached by the chief justice and the three justices who concurred in the first opinion mentioned will show that the results that would follow from the two do not materially differ. If the present actual value is taken as the basis for fixing the rates, with an additional allowance for the depreciation from that value, to make good the loss to the company by natural depreciation, the difference between that and an allowance upon the

first cost, if the same was reasonable, without any allowance for depreciation would be but slight. The general result would be about the same. Either would be just to both the company and its consumers.

The other justices of the court were divided in opinion. Mr. Justice Garroutte took the position, long since abandoned by all courts, so far as we know, that the court could not inquire into the reasonableness of the rates, and if the rates fixed would return *any* net revenue the courts were powerless to interfere, and that the value of the plant should be taken as the basis. [118 Cal. pp. 578, 581.]

Mr. Justice Temple says:

"I do not comprehend how, in this case, the exercise of the power to regulate charges or to fix compensation for furnishing water is a taking within the meaning of section 14 of article I of the constitution. * * * There is, then, no obligation to remunerate water companies for investments made or to allow interest thereon either upon first cost or present value. * * * The only proper judicial question is whether compensating rates have been fixed. Whether they are too high or too low is not a judicial question. The judge cannot substitute his judgment for that of the body to whom the discretion is given by the constitution." [118 Cal. pp. 584, 585, 586.]

Mr. Justice Harrison, in the same case, holds that the present value, meaning evidently, the market value, for he speaks of its fluctuations, is the proper basis of fixing rates and says:

"The water company has the right to protection by the judiciary from the enforcement of such rates as will deprive it of compensation for furnishing the water, but if the rates fixed by the council afford compensation the question of the reasonableness of this compensation is a question of fact which is not open to review by the courts."

According to the conclusion arrived at by these three learned justices, by a separate line of reasoning adopted by each of them, if the rates fixed would yield *one cent* over and above operating expenses the company would have no security under a constitution which requires that the rates to be fixed shall be *reasonable*.

In the case at bar the learned judge of the Circuit Court holds in unqualified terms, that the courts have the power and jurisdiction to inquire into the reasonableness of the rates.

San Diego Land and Town Co. *v.* City of National City, 74 Fed. Rep. 83.

But he holds with the justices of the state Supreme Court above referred to, that the present value of the plant must be

taken as the basis of fixing rates and that if the rates will furnish a reasonable return upon such value the rates are reasonable and just. That is to say, if the company has invested a million dollars in the plant and the plant depreciates in value one hundred thousand dollars every year by wear and tear and decay by the action of the elements, the basis for fixing rates must be reduced a hundred thousand dollars every year. By this course of treatment the company is losing one hundred thousand dollars a year of the principal it has invested, and of which the public has received the benefit, and the interest it is entitled to receive is reduced by just so much every year. How long would it take for the company to lose its entire investment under such treatment at the hands of the public authorities? And why should such a basis be fixed from the consumers' standpoint? Is the service of the system worth any less to him the second or any subsequent year than it was the first, so long as the system is able to deliver the water? The million dollars was expended for his benefit to supply him with water. Why then should he not pay a reasonable interest on the money advanced for his use?

Our contention is that the company should first be allowed for its actual and necessary operating expenses and maintenance, including necessary repairs; that it should be allowed a sum sufficient to make good the natural depreciation of the plant, and, over and above this, a sum that will return to the stockholders a reasonable rate of interest on the amount actually and reasonably invested in the plant by and through which the water is furnished to consumers; and that the rate of interest to be allowed over and above operating expenses, maintenance and depreciation should, in no event, be less than the amount paid by the company as interest on its bonds, provided that neither the amount borrowed nor the rate of interest paid is excessive.

We submit, with confidence, that rates fixed on this basis could not be unreasonably high.

But there have been three objections urged against our position. The first is that the *present value* of the plant must be taken as the basis for fixing the rates, and not the amount necessarily expended in constructing it; another that the natural depreciation of the plant should not be considered, because the loss thus incurred is covered by an allowance for repairs, and third, that the interest on the bonds should not be

considered at all, because a company that borrows the money to construct its plant should not be allowed more than one that pays for it out of its own money.

Let us examine these objections briefly: And first, shall a return be allowed on the amount actually and reasonably invested in the construction of the plant, or upon its present value, if it has depreciated in value from natural causes resulting from its use for the public good, or can be duplicated for less money because labor or material has become cheaper? We maintain that to make the present value the basis of fixing the rates is both impracticable and unjust. It is clearly impracticable because the property has no value except as the means of earning the rates that may be fixed by the common council. It has no commercial value. It cannot be taken away and used somewhere else if the company is not satisfied with the rates. Its capacity to earn money is dependent wholly upon some one else besides the company. The company is compelled by the terms of the constitution to supply the water for the rates fixed, on penalty of the forfeiture of its plant, whether the rates are reasonable or unreasonable, unless relief is obtained from the courts. Its value cannot be arrived at by comparison with other property of a like kind, because there is none, and if there were, the value of the other property would be equally uncertain. The plant has no earning capacity in the true sense of the term. Its ability to earn money depends neither upon its commercial nor its intrinsic value, nor upon competition, or the supply or demand, but wholly upon what the common council says it may collect. If the rates are so fixed that it can earn nothing, it is worth nothing. That is the present condition of the property of the appellant and has been for years. It has earned absolutely nothing for its stockholders, and its stock is worth nothing. But suppose you undertake to ascertain the present value of the pipes in the ground, how will you arrive at it? To what extent has it decomposed, and what is it worth compared with such pipe when new? You must dig it up to find out. And when you have found out, what is the pipe worth in the ground if the common council do not allow reasonable rates for the water to be carried through it? No one who thinks carefully on this subject will ever reach the conclusion that the fixing of rates on the basis of the present value is practicable.

But conceding it to be practicable, is it just? Those who maintain the doctrine that the present value of the plant shall control usually claim that the cost of duplicating the plant new shall be ascertained, and from that a deduction be made for the depreciation in the old pipe. But that is not ascertaining the *value* of the plant new, but its cost. And to deduct the depreciation is to charge against the company its own loss, which we maintain should be made good to it by the rates, in order that it may replace the plant when it will no longer "hold water." And is it just, conceding all things else, to compel the company to accept rates on the basis of what the plant can be duplicated for? It has expended over a $1,000,000, for the public good. It has constructed the plant when material and wages were high. A large part of it has been put in piece at a time, as the public necessities called for it, which made it more expensive than if put down as a whole. Must a public enterprise of this kind watch and wait until material and wages are cheap, and the town has got its growth, before developing and supplying the water? And if, as the opportunity for extending the area of the city presented, if only water could be obtained, the company had said, "Oh, no, we cannot put one pipe line down at a time. It is too expensive. We will wait until you build your city, and then put in the whole system at once and save money to us, and to you as well, because your water rates will be less if we put in the plant as a whole," the enterprising citizens who desired to build fine homes on the outskirts would have made it interesting to the company. The company constructed its system when materials and wages were high because the public necessity for water demanded it. The good people got, and still retain, the benefit of this necessary expenditure. If so, why should the consumers not pay a reasonable return on that necessary expenditure made for their benefit? There is no reason whatever. To require it would work no injustice. They are not buying the plant. They are simply paying for the use of it, by which they get the water they must have. Without the expenditure of what the plant cost they must have gone without water or removed to some other locality.

We contend, therefore, that to require a reasonable return upon the amount actually and reasonably expended for the plant is the only practicable and just solution of this vexed question.

And there can be no doubt but that this was the intention of the legislature in providing for the fixing of the rates. The statute provides:

"Sec. 2. The board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, are hereby authorized, and it is hereby made their duty, at least thirty days prior to the fifteenth day of January of each year, to require, by ordinance or otherwise, any corporation, company, or person supplying water to such city and county, city or town, or to the inhabitants thereof, to furnish to such board, or other governing body, in the month of January in each year, a detailed statement, verified by the oath of the president and secretary of such corporation or company, or of such person, as the case may be, showing the name of each water rate payer, his or her place of residence, and the amount paid for water by each of said water rate payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of all expenditures made for supplying water during said time.

"Sec. 3. Accompanying the first statement made as prescribed in section 2 of this act, every such corporation, company, or person, shall furnish a detailed statement, verified in like manner as the statement mentioned in section 2 hereof, showing the amount of money actually expended annually since commencing business, in the purchase, construction and maintenance, respectively, of the property necessary to the carrying on of its business, and also the gross cash receipts annually, for the same period, from all sources."

Stat. 1881, p. 55, Secs. 2, 3.

This statute requires, as a basis for fixing the rates, a detailed statement of the receipts of the company for the last year, on the one hand, and a statement showing "*the amount of money expended*, annually, since commencing business, *in the purchase, construction and maintenance, respectively, of the property necessary to the carrying on of its business*," on the other. That is to say, the *cost of construction* and the cost of maintenance must be furnished the common council upon which to fix rates.

And in order that the council may know what the company has realized from rates previously fixed, as a guide for its present action, the company is required to show, under oath, "the *gross cash receipts, annually, from all sources.*"

This statute is entirely inconsistent with the idea that rates are to be fixed upon the basis of present value. It shows that the amount "*actually expended*" in constructing the plant shall be taken as the basis.

And in a very late case it is said that the rates shall be such as will enable the company to "receive on the *capital actually and bona fide invested in the plant* a remuneration," etc.

New Memphis Gas & Light Co. *v.* City of Memphis, 72 Fed. Rep. 952, 955.

And we submit that this is the only just and practicable basis for fixing rates. If this court shall determine that the present value shall control, there will be no end to the litigation that must result from an effort, each year, in each case, to arrive at the present value. And every effort of that kind must inevitably be a failure.

With respect to the question of depreciation, it is usually claimed that there can be no allowance of an amount to make good the loss to the company by natural depreciation, because such loss is made good by the repayment of moneys expended for repairs. If it were true that the loss by depreciation were met in the way indicated, the position taken would be unassailable. But it is far from being true. Repairs in the proper sense are the ordinary patching of pipes where leaks occur and the replacement of a piece of pipe here and there, as defects are found or breaks occur, and work of a similar kind occurring each year. But while these repairs are going on, the whole plant is slowly but surely going to decay, and sooner or later whole pipe lines, and eventually the whole distributing system, must be replaced. It cannot be maintained that the gradual loss, which must inevitably compel the company to replace its entire plant, is met by the payment for repairs made each year. Entire pipe lines have had to be replaced because the old pipes have gone to decay. If this replacement had been charged up against consumers as *repairs*, they would have been compelled to repay to the company the whole amount thus expended. But it was charged up on the books of the company as new construction, thus adding to the actual amount expended, and upon which a fair interest should be paid by consumers each year. Again, one of the large mains of the company will soon have to be replaced with an entire new line of pipe. This alone will probably cost $12,000. If this sum is charged against consumers as *repairs*, this whole expenditure must be repaid the following year after the expenditure is made. This is necessarily so under the position taken that this gradual wearing away and

eating out of the pipe system is to be made good by paying for all replacements as repairs. It must be seen at once by any one who stops to think of the consequences, that this would be unjust to consumers. According to the evidence of engineers this whole pipe system will have to be replaced in a few years. And according to this contention the whole expense of replacing the old with new must be repaid by the consumers. Under such a rule, if established by this court, consumers receiving water from a new system would pay but little, although the service to them would be as good, even better, than when the system begins to fall into decay, and later consumers will be compelled to pay for the replacement of the whole system. No one can fail to see the injustice of such a rule. If it were adopted and enforced, the company would have no reason to complain, as it must eventually have all of its money invested in the plant returned to it in rates, and the consumers would still have to pay a return on the *value* of the new plant, according to their contention, although actually constructed with their own money. This would, it seems to us, be utterly unreasonable and unjust to the consumers.

On the other hand, if nothing is allowed to the company but the repayment of the amounts expended from year to year for ordinary repairs, and without taking into account this continuous depreciation, the company must eventually be brought to ruin, because it must in time replace its whole plant, and no sinking fund has been provided or other provision made for such purpose.

We submit that the only proper and reasonable way of adjusting the loss by depreciation, between the company and its consumers, is to allow each year a reasonable percentage to meet this loss and provide for the replacement and renewal of the plant, new for old.

With this diversity of opinion on the part of the courts, this company may well appeal to this court of last resort to lay down some basis upon which it can be assured a reasonable return upon its investment, and such as will prevent the gradual but sure confiscation of its property. And this renders it proper to inquire how far this court has gone in the effort to fix and determine what is a reasonable basis upon which a return should be allowed.

In doing so, we shall not attempt to review the numerous cases on the subject. We assume that it may be taken for granted, at the present day, that it is fully and finally determined by this court that the courts have the power and jurisdiction to inquire, not only whether *any* net revenue will be returned to the company, but whether the rates established will afford a *reasonable* return or compensation. It was so decided in this case by the Circuit Court, and the later decisions of all the courts are clearly to that effect.

As to what shall be taken into account in determining what are reasonable rates, we may properly take the latest decision of this court as its final conclusion on this important question, so far as rates to be allowed to railroad corporations are concerned.

In Smyth v. Ames, 169 U. S. 464, 546, this court has said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by corporations maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of the stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."

And this authority is relied upon as affirming the doctrine that the present value of the plant must be taken as the basis of fixing rate. But conceding this to be the now established rule as respects the rates to be charged by railroad companies, is it applicable to water companies supplying water under the constitution of California? We maintain that the cases are not parallel, and that such a rule, while it might be applied to railroad corporations practically and without injustice, cannot be made applicable to water companies under the law of California.

Under the state law, the water company is not the owner of the water it stores and distributes. The water is declared by the constitution to belong to the public, and the right to collect rates

or compensation for the use of water supplied "is a franchise and cannot be exercised except by authority of and in the manner prescribed by law." And any person, company or corporation collecting water rates other than as so established shall forfeit his or its franchises and water works.

Const. Cal., Art. XIV, Secs. 1, 2.

Now, what relation does the company bear to the consumer, under these constitutional provisions? It is nothing more than the agent of the public. It furnishes the plant for the use of the public. It cannot remove the plant, even if it were possible to do so. It must continue to supply the water, at the rates established, on pain of forfeiture of its entire property. It is impossible to arrive at the value of the plant by the amount of the stock of the company, or of the bonds issued by it. The Supreme Court of the state has held directly that the amount of bonds issued by the company is immaterial and cannot be considered. [San Diego Water Company *v.* San Diego, 118 Cal. 556.] The market value of the plant cannot be ascertained, because it can by no possibility have any market value.

It is equally impossible to arrive at its actual value. All of its pipe lines are under ground. Their condition each year, when rates are to be fixed, cannot be ascertained. If the actual present value is to be taken as the basis, this value will have to be determined every year, because the rates must be fixed every year.

Can it be just to say that the company shall be allowed upon what it will cost to replace the plant new on the day the rates are fixed each year? There can be no justification of such a rule as respects either the company or the consumers. It would compel an investigation each year, to determine the cost of such a plant and the rates would vary each year as the cost of steel and other material and of labor might rise or fall. This means of adjusting the rights of the parties in interest would be a compromise, at best, and a very impracticable one.

We submit, in all confidence, that there is but one solution of this much vexed question and it is one that the courts must, we believe, reach sooner or later, viz., that a company of this kind shall receive a reasonable and just return upon the amount reasonably, necessarily and properly expended in furnishing to the public the plant and appliances necessary to be

furnished in supplying them with water, or the actual and necessary cost of the plant. As we have shown above, this is undoubtedly what is contemplated by the statute quoted from which requires the company to make a showing of the cost and the operating expenses. This amount has been expended for the public benefit when it was demanded. The expenditure can bring no return except by way of rates fixed and established. The property cannot be moved elsewhere, but in legal effect becomes the property of the public, as the public alone can have the beneficial use of it.

We respectfully submit that the case of Smyth *v.* Ames, *supra*, and other cases relating to railroads are not parallel cases and are not in point as to the basis upon which rates should be allowed.

V.

THE RATES SOUGHT TO BE SET ASIDE HERE ARE UNREASONABLE AND AMOUNT TO A TAKING WITHOUT COMPENSATION WHATEVER BASIS MAY BE TAKEN FOR THE FIXING OF RATES.

The judge of the Circuit Court, after deciding that the court had the power to inquire into the reasonableness of the rates, held that the rates in this case, which we think the record will show, did not return to the appellant one dollar of net revenues, were reasonable rates. How he arrived at this conclusion cannot be ascertained from the opinion. It is quite clear, however, that the court was influenced by evidence and considerations wholly immaterial to the question presented. There was evidence to the effect that the appellant was the owner of a large part of the land under its system, that this land was greatly increased in value by putting the water upon it and that the appellant was enabled thereby to sell a part of its lands at an enhanced price, with the water. This evidence was objected to as being immaterial and it was urged at the hearing that such evidence should not be considered by the court. But the court did consider it as the opinion shows and this is assigned as error.

Record, page 356.

All lands owned by the appellant were charged with the same burden of maintaining the water system as all other lands and paid precisely the same rates.

Record, page 110.

Under the laws of California the fact that the appellant was both a water corporation and a land corporation could not affect its rights or its liabilities as a water corporation.

Price *v.* Riverside Land and Irrigating Co., 56 Cal. 433.

The lands of other consumers under the system were increased in value by putting in the water system precisely the same as those of the company. This being so why should the company be required to accept less rates on account of the benefits accruing to its lands any more than other land owners should be required to pay double rates for the water they used because the water right attached to their lands increased their value. The element of the company's ownership of lands was, we submit, a false quantity that should not have been considered in this connection for any purpose.

In arriving at what are just rates we maintain that four things must be taken into account, viz:

1. The cost of the plant.

2. The cost, per annum, of operating the plant including interest paid upon money borrowed and reasonably necessary to be used in constructing the same.

3. The annual depreciation of the plant from natural causes resulting from its use.

4. A fair profit to the company, over and above these charges, for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis.

Taking this as a basis, what should the rates return to the appellant in order to be reasonable?

In order to determine this we must first ascertain what the system cost, the amount of interest the appellant is compelled to pay, the cost of maintaining the plant, the operating expenses and the amount lost by it in the way of the natural depreciation of the plant.

These are as follows, as shown by the undisputed evidence:

1. Cost of plant..... $1,022,473.54
   Record, pages 42, 43, and exhibit 1. Record, page 324.

2. Operating expenses, including interest on $150,000..... ..... 22,534.99
   Record, page 45, exhibit 1, page 325.

4. Depreciation of the plant, per annum..... Record, pages 46, 325.	43,408.26
Total expenditures.	65,943.25
5. Amount the company should receive as interest at 6 per cent. on its investment, less the $150,000 borrowed, and for which interest is charged above as part of its operating expenses.....	52,348.41
Total amount which should be realized from rates inside and outside of National City.....	118,291.66

For a full and detailed statement of the items and amounts stated above, see exhibit 1. Record, pages 324, 326.

But this exhibit, and the account as above stated, is based upon the statement made by the complainant to the board of trustees referred to therein, which charges up interest on $150,000 only, when, as shown by the evidence, the company had, before this ordinance took effect, incurred indebtedness to the amount of $150,000 additional by putting in pipe line No. 2 and making other improvements and additions. So that the amount of the fixed charges of the company during the term for which this ordinance will run are $10,500 more than above stated. But, as we have made the statement, this amounts only to a loss to the company of 1 per cent. per annum on the $150,000, as we allow 6 per cent. only on the investment, while upon most of the amount borrowed 7 per cent. is being paid. The amount alleged in the bill as necessary to pay operating expenses, and return the complainant 6 per cent. interest, is $119,799.66. It will be seen by the above showing that the actual fixed charges of the company, including the interest it must pay on borrowed capital, amounts to $33,034.99. It must have this amount before it can realize a dollar upon the $722,473.54 that its stockholders have put in of their own money. Not only so, but the evidence shows, without any dispute, that the complainant is losing $43,408.26 per annum by the steady and unavoidable depreciation or destruction of its plant that will, in the estimated time of from *fifteen* to *seventeen* years, wholly destroy its pipe line. [Record, pp. 46, 221, 222.] In fixing the rates in controversy the board of trustees found the depreciation for the six years the plant has been in existence to be *fifty per cent.*

Record, page 302.

Provision must be made for making good this natural decay of the system or the appellant must, in a few years, lose its entire investment and the consumer be without the public use guaranteed to him by the constitution, *if he pays for it.* Therefore, in order to keep the system alive, and without paying one cent to the stockholders, the consumers must pay rates sufficient to realize to the appellant $76,443.25.

Now let us see how near they have come to raising this amount. The total receipts of the company from water rentals from the whole system are given by Mr. Boal, the general manager of the company. The highest amount was for the year 1894, and reached only $24,564.67, which was leaving a clear loss to the company of over *fifty-one thousand dollars.* But the evidence shows that during that time the company received from the sale of water rights $9415. Of this National City contributed *one hundred dollars.*

Record, page 46.

How much of this was received in any one year does not appear, but it is unimportant. If the whole of it were credited for the year 1894, the loss of the company would still run above *forty thousand dollars per annum.*

The real question in the case is not whether the rates are sufficient, taking the whole territory covered by the system into consideration. That they are wholly inadequate is too plain for argument. The question that seems, from the manner of taking the evidence, to be the most strongly controverted is, how much of the deficiency in rates should be made up by National City? But this is not the question. The question is, "*Are the rates fixed by the ordinance in controversy unreasonably low* considering the due proportion of the burden of keeping up the system that should be borne by National City and its inhabitants?"

This question, we respectfully submit, can have but one answer. They are so low that to maintain them, and at the same time maintain the same rates outside of National City, which must, in justice to outsiders as between them and consumers inside of the city, be done, will mean the speedy confiscation of the appellant's plant. It had much better defy the inhibition of the constitution against charging higher rates and terminate its existence by the constitutional method of forfeiture. It will a little, but only a little, sooner be out of its misery.

It appears from the evidence that for that portion of the distributing system for use in National City alone, the complainant expended $183,753.90.

Record, page 45.

Besides this, the city should bear its fair proportion of the cost of the dam by which the water is stored, and of the two main pipe lines through which its water is carried to its distributing system. The claim of the complainant, as alleged in its bill, is that National City should bear one-half of the burden of keeping up the system. The defendants contend that it should not bear more than one-fourth. This is a matter which cannot be definitely determined, because in National City the use is mainly for domestic purposes, which calls for a more complicated system, with a greater number of service pipes and connections, and for which higher rates are always charged and allowed, while outside the use is generally for irrigation of lands with less attendant expense. At the instance of the defendants the engineer of the complainant, Mr. Savage, is asked to estimate the proportion of the rates that should be borne by National City.

Mr. Savage arrives at National City's proportion as follows:

"Q. The basis on which these figures are made is, taking first the cost of the Sweetwater dam as has been testified about in previous testimony—and I want to say that these figures, while approximately correct, are not exact calculations carried down to pennies, as they are in round numbers—the cost of Sweetwater dam at $250,000, the cost of the reservoir, $132,318.82.

"Mr. Works: Those are the same figures you had heretofore, are they?

"Witness: Yes, sir. The total of those two items would make $382,318.82. The main pipe lines through which water is supplied from the Sweetwater dam and reservoir to National City limits, one main 36, 30, 24 and 18 inches diameter, reducing throughout its length with a second main 6 inches in diameter on Second Avenue, Chula Vista, entering the city limits on the south; another main 6 and 4 inches in diameter on Fourth Avenue, entering the city limits on the south, and pipe line No. 2, have cost to date, approximately, $235,057. The pipe lines in National City distribution system at the present time have cost, approximately, $184,000. The pipe lines outside of National City, exclusive of the above main pipes, $221,000; the cost of maintenance and operation of the pipe system was substantially $14,680. Now these calculations do not take into consideration any credits for National City by reason of one of the pipe lines passing through it being used as a supply pipe to land outside, but to offset this the cost of maintaining the pipe line in National City is taken to be the same in proportion to its cost as the maintenance of the pipe

lines outside of National City, which more than balances what credit National City system would be entitled to by reason of its pipe line being used as a main for outside supply, by reason of the excess number of leaks in this same main pipe throughout the limits of National City.

"The first item chargeable to National City would be its proportion of the operation and maintenance of the system, the entire operation being $14,680; hence the proportion chargeable to National City may be obtained from a proportion: as the cost of the entire pipe system is to the cost of the National City distribution system, so is the cost of total maintenance and operation to the proportion chargeable to National City distributing system, which gives in round numbers $4200. Then, from statements prepared and already submitted, it is found that National City is using approximately one-fourth of the water being delivered through the main pipe lines, consequently National City should be charged, taking that as a basis, with one-fourth of the expense of maintaining these mains and the dam and reservoir which, for the main pipe lines, can be obtained by another similar proportion, deducting of course from the above maintenance that portion already charged to National City, which will give $1000 as the amount National City should annually contribute towards the maintenance of these main pipe lines. Then for depreciation National City's proportion of the depreciation of the system, beginning at the dam and reservoir—the reservoir naturally has no depreciation—the dam has been charged with a depreciation of about two per cent., which has been a minimum quantity up to the present time, by reason of floods and so forth, and necessary repairs, and has been taken as a whole at $5000. One-fourth of this being charged to National City would make $1250. Then National City's depreciation of the main pipe lines, the cost of which has already been given at $235,000, National City's proportion being one-fourth of this, which depreciation has been taken at six per cent. in this computation, would give another amount of $3525. Then, National City's depreciation of her distribution system should, of course, be charged wholly to National City, six per cent. of $184,000 would give $11,040. Then the interest charges which may be made, National City paying one-fourth the interest charged on the dam and reservoir, six per cent. on $382,318, would give an amount of $5760. National City's interest, maintenance on the main pipe lines, the cost of which has already been given as $235,000, National City paying one-fourth of six per cent. on this amount, or $3525. And then National City again paying the interest on the distribution system within its own limits, six per cent. on $184,000, making $11,040. Now, that would give a total of $41,370 as an annual amount chargeable to National City, as her proportion of the maintenance and operation, depreciation and interest on the cost of the system as above."

Tr. of Ev., pages 333–336.

This shows that the proportion of National City, in money is $41,370.

The statement of Mr. Savage is the only evidence on the point. It will be seen that the witness fixes the proportion of

National City at one-fourth. The answer of the defendants admits that it is at least one-fifth.

Actual experience shows that it is at least one-third. As alleged in the answer, the complainant has charged the same rates outside of National City that have been fixed within the city. And upon this basis of equality, the rates have realized, within National City, for the past year, $10,715, and outside of the city $15,000.

This showing of actual results, from the same rates inside and outside of National City, is more reliable than mere estimates.

But it is not at all material, so far as this case is concerned, whether we take the proportion to be one-third or one-fifth, as the rates fixed will not come anywhere near realizing one-fifth of the actual amount necessary to be paid by the appellant in order to keep the system going, aside from any question of profits. As we have shown, the amount that the company must pay out, before any part of its receipts can go to its stockholders, including what it is losing by depreciation, and which must be made good by the company, is $76,443.25. One-fifth of this amount is $15,288.65. Bear in mind, we are not figuring on any *profit* to the company now, but on the amount necessary to continue the plant in existence.

The actual amount realized from rates, in National City, last year, under an ordinance which did not differ materially from the present ordinance, was only $10,715.29. This is less than two-thirds of the *one-fifth* of the actual expenditures of the company.

So, upon any basis of figuring that can be conceived of, the rates in National City are so unreasonably low as to render the ordinance wholly void.

Leaving this question, we desire to call the attention of the court to the manner in which, and the basis upon which, the rates were actually arrived at and fixed. The bill alleges, as one of the reasons why said ordinance should be declared void, as follows:

"c. Said water rates were fixed by said board of trustees arbitrarily, and without notice to or any trial or taking of evidence with reference thereto, and were fixed so low that the same are unreasonable and unjust, and at the rates so fixed the complainant cannot realize

therefrom and from all other sources within and outside of the limits of said city of National City sufficient to pay its ordinary and necessary operating expenses and pay any dividends whatever to its stockholders or interest or profit on its large investment."

The absolute proof of the truth of this averment has been furnished us by the defendants themselves. It is not contended that any notice of the hearing was ever given the complainant, unless the law furnished such notice. As to the manner of fixing the rates, and the basis upon which they were allowed one, and only one, of the members of the board of trustees, Mr. Routson was called as a witness. His testimony did not prove satisfactory, and they called Mr. Palmer, the city attorney, to state just how and upon what basis they fixed the rates. Mr. Routson testified, without reserve, that he understood that the rates fixed would not pay the complainant its operating expenses and any profit, and that he would not and did not fix the rates upon the basis of what the company ought justly to receive, but at the amount he believed the people could afford to pay. We quote from his testimony:

"Q. What figuring was done, if any, by your committee to arrive at the basis of fixing these rates—was there any at all? A. About as I have stated. The amount of figuring that was done was simply with reference to receipts, basing our calculation on this year, so much as to —*we knew very well we could not fix any rate that would give this company a reasonable per cent. on what they claimed their investment was.* We could not fix any rate——

"Q. Didn't you state at that time, Mr. Routson, when Mr. Savage and Mr. Boal presented a statement of their expenses and the amount they had invested, and what would be necessary in order to make them a return, didn't you say at that time that the rates could not be fixed upon any such basis, for the people could not afford to pay it? A. I expect I did—at least, I say so right now.

* * * * * * * *

"Q. Isn't it true that you have regarded, all along, in your acts as a member of the board of trustees, that these rates that have been prevailing there are as high as the people could afford to pay? A. Yes, sir.

"Q. And have, upon that theory, refused to raise them? A. Oh, no; not on that theory wholly.

"Q Well, upon that fact; or call it theory? A. Yes, I have an opinion right now, and always have had, that the rates as now fixed and the rates as prevailing, which are about the same, are all the people there can afford to pay.

"Q. Now, suppose, Mr. Routson, that you had taken this report made by the company, and taken all of its legitimate receipts, its operating expenses and the expense of maintaining and keeping the plant in repair, and the deterioration of the plant, if any, and had

discovered that in order to pay the company a return upon its investment, considering all those things, that these rates would have had to be raised one-third or one-half— A. Yes, sir, I do say so, or maybe two or three times.

"Q. Would you, knowing that fact from those figures, have voted to raise the rates to those figures? A. No, sir, I never would.

* * * * * * * * * * * * *

"Q. Did you ascertain from that investigation, Mr. Routson, that in your judgment these rates would be sufficient to pay the operating expenses and the expense of maintaining the plant, and the interest that the company was compelled to pay on its bonds, and return it any revenue? A. Did I think it would?

"Q. Yes. A. I thought it would not, if their figures were correct.

"Q. You were pretty sure it would not? "A. I was pretty sure it would not, even allowing that it would produce $2000 more than it did the year before, it would not produce anything to the company any more than—"

Record, page 295-297.

This shows conclusively that the rates were not fixed upon a basis which would pay the operating expenses of the company, even, much less pay it any return for its services in furnishing the water to consumers. And this leads us to inquire upon what theory of law these rates are to be fixed. Is it upon the theory that the water when developed belongs to the public, and that the company is a mere public servant or agent for its impounding and distribution, or does the water belong to the company to be sold by it for what it can get? This is a vital question that lies at the very foundation of this matter of fixing rates. If the company is a mere agent of the public, whose duty it is to supply the water to whomsoever may demand it, at the price fixed by the public authorities, the consumers are the principals. It is their plant, in the sense that they must maintain it and pay the expense of operating it, and pay their agent, the company, a reasonable compensation for supplying the plant through which the water is furnished and distributing and supplying the water. If on the other hand the water belongs to the company and can be delivered to whomsoever it chooses, or if it sees proper it may use all the water on its own lands, to the exclusion of others who may demand it; it must stand upon the footing of dealers in other commodities and take its chances of loss or gain. If the former, the consumer cannot say, you must furnish me the water if I demand it but I will pay you only what I can *afford* to pay, and if not enough

you must bear the loss. If the latter, both parties are free, one to sell and the other to buy, if the price is satisfactory to both, and the seller must bear the losses if any occur.

The defendants will not hesitate to choose between these two theories of the law. They will say the water is a public use; you have no choice in the matter, but must furnish it when we demand it, and pay or offer to pay, the rates fixed by the proper authorities. The constitution of the state so says in plain and unmistakable terms.

Art. XIV, Secs. 1, 2.

The Supreme Court of the state has so decided:

People *v.* Stephens, 62 Cal. 209;

McCrary *v.* Beaudry, 67 Cal. 120.

The consumer can take the water or not as he chooses. If the rates are more than he feels able to pay he can avoid liability to pay them by not using the water. But the company is compelled to furnish the water when demanded, whether the rates are fair or not, on pain of forfeiture of its plant. The result is that if the rates are unreasonably low, to the extent that they will not keep the plant intact, and pay its operating expenses, the plant will either be confiscated by continuing to supply the water, or be forfeited by a failure to furnish it. This being so, it is no excuse for a failure to fix reasonable rates that the rates actually fixed are as high as the consumers are able to pay.

But Mr. Rouston's idea that the rates must not be higher than the consumers can afford to pay, or in other words must not be "more than the traffic will bear," is better than the theory upon which, according to the testimony of the city attorney, the rates were actually fixed. He states what occurred in fixing the rates, as follows:

"Q. Well just state what was said? A. It was said that according to the testimony previously given, of Mr. Savage, before the board of trustees, that the whole plant could be duplicated for $600,000. Taking that as a basis it was estimated that about one-third of the number of acres were actually irrigated which could be irrigated under that system, and so reckoning the cost of the dam and reservoir at $250,000, one-half of that amount only was properly chargeable to the water system. It was estimated that the pipe system, which was supposed to have cost $350,000 would cost, duplicated --has depreciated about fifty per cent., and therefore its present value

would have been $175,000. That added to the one-half value of the dam and reservoir was placed at $300,000, the capital which was supposed to be chargeable to the consumers.

"*Mr. Works:* That would make the total, you mean, $300,000?

"*Witness:* $300,000.

"Q. Was that National City's proportion of all? A. It was then estimated that the proportion of National City would be one-fourth of this, or $75,000, and it was stated that the proportional part of the cost of maintenance, leaving out the interest and one-half the attorney's fees chargeable to National City, would be one-fourth, which deducted from the amount actually paid during the past year by National City for water rent would leave, on the basis of $75,000 capital, ample payment for depreciation and some payment of interest. The discussion of these points, with Mr. Lanning principally, took place for upwards of an hour, after which the committee adjourned. The board of trustees met and the committee recommended the passage of the ordinance No. 118 as it was finally passed, as it is now, excepting the change which was afterwards made from one and one-half cents per thousand gallons for acre irrigation to two cents per thousand gallons, meter rates."

Record, page 302.

We are assured by this legal adviser of the city that there "appeared to be an effort on the part of the committee to arrive at a just and fair solution of the question before it." There is a grain of comfort in this assurance that the committee, at least did not wilfully attempt to confiscate our property.

The basis of the rates, and the foundation of the ordinance, as testified to by this witness, amount to this:

1. The plant, which cost over a million dollars, could be duplicated for $600,000.

2. It was estimated that only about one-third of the number of acres were actually being irrigated which could be irrigated under the system, so they reduced the cost of the dam from $250,000 to $125,000 on that account.

3. It was estimated that the pipe system, which they had supposed had cost $350,000, had depreciated 50 per cent., so they lopped off $175,000 there.

4. This left the company with $300,000 upon which it was allowed rates. It had lost the other $722,473.54, upon which it could, according to this theory, receive no return.

5. They estimate that National City's proportion of the burden of this $300,000 capital, that the company had not been figured out of, was one-fourth, or $75,000.

6. The proportional part of the cost of maintenance, *leaving out the interest and one-half of the attorney's fees chargeable to National City*, would be one-fourth.

7. Lest the company might still get away with something that did not belong to it, they "deducted the amount actually paid during the past year by National City for water rent."

8. And this they estimated "would leave, on the basis of $75,000 capital, *ample payment for depreciation and* SOME interest."

Trans. of Ev. pages 444; 445.

We are sincerely thankful that they left us something. A little more figuring, such as this, and all would have been lost.

They first charge us $422,000 for having built the system when material and labor was high, then charge us $125,000 because only a part of the land owners who might have done so had irrigated their lands and bought water from us for that purpose; then charge us $175,000 for letting our pipes wear out in their service, leaving us only $300,000 out of the wreck. The company had actually expended in putting in National City's distributing system, originally, $161,666.40, to which it had, in order to make the system complete, added, just before this ordinance took effect, $22,087.50, making a total expended in and for the sole benefit of the city of $183,753.90.

See exhibit 1. Record, page 324.

They managed, by their novel system of cutting down the investment, to reduce this to $75,000, to say nothing of the proportion of the dam and reservoir, and the mains leading therefrom, to supply this distributing system. It is a sample of the iniquitous workings of an unjust law that allows the buyer of an article to dictate what the seller shall take for it or suffer a forfeiture of his property. It is a most flagrant case which calls for prompt and decided judicial interference.

Our only cross-examination of the witness was to inquire if he had stated fully the basis upon which the rates were fixed, and if he and the members of the board of trustees regarded the rates fixed as reasonable on that bases, which he answered in the affirmative.

This should be proof enough that the rates are grossly unreasonable on any proper basis.

The Circuit Court did not decide the case against the appellant on the ground that the facts were not as stated above. This could not be done because the facts were undisputed. The learned judge says:

"It is quite evident from the record that the maintenance of so extensive a water system for the supply with water of such a sparsely settled territory, taken as a whole, and considering the value of the property, and the depreciation by wear and tear of the plant, does not yield the complainant very much above expenses, although it appears from the statements of the accounts of the water department, reported to the company by its president, that the net income to the company from that department for the year 1894 was $7850.18; for the year 1893, $13,160.58; for the year 1892, $7547.93; and for the year 1891, $4449.27. But, for such profits, be they small or great, or even for losses thus incurred, the consumers of water within National City are not responsible. Such losses, if any such have been sustained, must be borne by the complainant as best it can, like all other companies and individuals who embark in undertakings whose realization does not come up to their expectations and hopes. Had the complainant succeeded in selling, or in procuring the settlement upon and cultivation of, all or a large portion of its lands and lots, and thus have secured a larger number of consumers of its water, no doubt its investment, as a whole, would have proved fairly remunerative, and may, it is to be hoped, yet do so. But if, as I think the evidence shows, the rates established by the ordinance complained of, to wit, City Ordinance No. 118 of the defendant corporation, will yield a fair interest on that portion of the value of the property properly referable to the territory embraced within National City, making due allowance for the cost of its maintenance, and the depreciation of the plant by reason of its wear and tear, it follows that the complainant has no just cause of complaint."

The court gives us no figures and we are puzzled to know how the conclusion was reached that National City was paying a fair interest on that portion of the plant chargeable to it. Taking that part of the system within National City which cost $183,753.90 and the six per cent. depreciation upon it would be over $11,000 per annum. And leaving off all question of depreciation and allowing nothing for operating expenses or interest paid and the rates would not return six per cent. gross on the cost of the pipe lines within the city alone out of which the company would have to pay its operating expenses including repairs and interest and make up the loss by depreciation, which must mean a clear loss to it on this basis of several thousand dollars a year. But this allows nothing to the company for National City's proportionate share of the cost, or value of the reservoir and dam and main pipe lines by which the water is supplied to the distributing system within the city.

No kind of figuring can be resorted to that will show that National City was, by the rates in question, paying one dollar of net profits to the appellant on that portion of the system devoted wholly to the supply of water to the city. We challenge counsel for the appellee to make any such showing.

This being so, what is said by the judge of the court below to the effect that National City could not be required to make good the losses the company might have sustained by a failure to realize sufficient revenue from the section outside of the city, is wholly immaterial. The same rates were being paid outside of the city that were paid inside. No rates having been fixed outside the company raised its own irrigating rates. If the city had been required to pay a reasonable rate the company might meet its operating expenses and escape actual confiscation.

But the court takes the further ground that the present value of the plant should be taken as the basis of fixing rates. We have undertaken, above, to show that this proposition is erroneous. But if we have failed in this there is no foundation for the rates assailed on that basis. The only evidence as to the value of the plant was that its value was $1,000,000. [Record, p. 48.]

This evidence is undisputed. The only other evidence was as to the cost of constructing the system new. The chief engineer testified that it could have been duplicated at the time the ordinance was adopted for about two-thirds its original cost.

Record, page 139.

Another engineer says it could be duplicated for seventy per cent of its original cost.

Record, page 223.

This is the only evidence tending to show present value.

But all of this is of no consequence in view of the other facts. If the plant was worth only $100,000, the result would be the same, as the rates allowed would not pay anything over and above expenses.

The engineer is asked the direct question whether, at the prevailing rates, the company could realize *any* profits, and he answers unqualifiedly that it could not, and that it could not if it were supplying water to all the lands it could serve with its system.

Record, page 114.

Which shows that the failure to realize any profit does not result from the fact that it is not yet supplying all the land under the system, but from the fact that consumers are not paying their proportionate share of a reasonable rate. And this evidence stands wholly undisputed and the fact is conclusively established by the record. The company has never demanded or expected that the consumers now being served shall pay the full amount that should be realized if all the lands were served. But the evidence in the record shows that over two-thirds of the full amount of land that the system could serve is being supplied, and this, with the domestic rates, should at least return two-thirds of a reasonable revenue. That they do so cannot be reasonably pretended.

The court below finds the cost of the plant to be as alleged, and finds that it was not excessive.

74 Fed. Rep. 85.

We respectfully submit that, conceding the Circuit Court to have been right as to the law of the case, which we strenuously insist it was not, still its conclusion that the rates were reasonable finds no support in the record.

One other thing should be called to the attention of the court, and that is the statement made in the opinion, that the reports of the company shows net profits for certain years.

74 Fed. Rep. 87.

The court seems to take this as establishing the fact, but the reports referred to were the annual reports of the company to the stockholders, and the actual figures produced and referred to above show beyond any question that these reports were erroneous, in that they did not include certain of the operating expenses of the company and other matters that should have been taken into account.

VI.

WHAT CONSIDERATION SHOULD THE AMOUNT OF BONDS ISSUED RECEIVE IN FIXING RATES?

The state Supreme Court has held that in determining what are reasonable rates, the amount of bonds outstanding and the interest charge thereon is immaterial.

San Diego Water Co. *v.* San Diego, 118 Cal. 556, 571.

But this is upon the rule laid down in the opinion, that the company is entitled to a reasonable return upon the *cost* of the

plant. If such an allowance is made, the amount of the bond issue is immaterial, as no company could justly be allowed interest on its bonded indebtedness in excess of the cost of its plant. The court says in this case:

"In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and even then some allowance or margin should be made for any risk to which the company may be exposed, over and above the risk taken by a lender."

118 Cal. 571.

But the Circuit Court in this case has taken an altogether different view of the law. It is held that the present value of the plant must be taken as the basis of fixing rates, and rates are upheld that would not return any interest on the bonds. This simply means confiscation, because, if the rates will not pay the interest on the bonds, the property must be sold to satisfy them. In the case of Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. Rep. 879, Mr. Justice Brewer, then circuit judge, said:

"The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed, any more than the property of the bondholders."

In this case the property cost over a million dollars. The stockholders supplied more than two-thirds of the amount without borrowing. They finally issued and sold bonds in the sum of $300,000, at seven per cent. interest, to complete and maintain the plant. This imposed a fixed charge of $21,000. The highest amount the company ever received from all sources, inside and outside of National City, was $24,564.67. This leaves a margin of only $3564.67. Out of this balance the company must pay its operating expenses, which amounted to $12,034.99, the last year before the rates were fixed, which was an average year. [Record, p. 45.] This left the company's loss $8470.32. The actual depreciation of the plant, as the undisputed evidence shows, amounted to $43,408.26. [Record, pp. 46, 325.]

By no possible means could the rates be made to meet this very moderate charge for interest, on less than one-third of the

cost of the plant, and less than one-half what it could be replaced for, and pay the company one cent. It is undeniable that the company must necessarily lose money in any event.

But the court in this case says:

"Can it make any difference that the complainant, in the construction of its plant and the carrying on of its work, borrowed $300,000 on which it pays interest, and for which, it may be, it issued its bonds. The buyer of such bonds, like the loaner of money on a mortgage upon real estate, does so with his eyes open. The loaner of money on a mortgage knows that conditions may be such as to increase the value of his security, or they may be such as to decrease its value. He takes the chances that everybody must take who engages in business transactions. The buyer of bonds issued by a water company such as the complainant has the like knowledge." * * * *

But the court does not intimate, nor does the evidence tend to show, that the plant of the appellant had decreased in value to less than $300,000, or that the amount of the bonds was excessive. If not, the company would have the right, undoubtedly, to such rates as would pay interest on that amount, over and above the operating expenses. It was so held in the Dey case. It could not with any reason or justice be held otherwise. And upon that basis of a value of $300,000, as shown above, the company must lose over eight thousand dollars every year, not saying anything about the depreciation of its plant.

But we do not wish to be understood as conceding that the position taken by the court that a bondholder must lose the difference of interest on the value of the plant when he advanced his money to construct it, and its present value, resulting from natural depreciation or other causes. The result that would follow is only another evidence of the injustice of the doctrine that the actual cost must furnish the basis of fixing rates. It was that amount that was paid for the consumers' benefit, partly, in this case, by the bondholders. The constitution of the state stood as a guaranty to the bondholder, who advanced his money for the public benefit, that reasonable rates should be fixed by the public authorities, and certainly a rate that would not return him the interest upon his money, if the loan was not excessive, and pay the operating expenses, would be unreasonable.

We respectfully submit, in conclusion, that the Circuit Court erred in all of the important matters of law above discussed, and further that, if it did not, the court erred in dismissing the complainant's bill, for the reason that, upon any conceivable theory

of law that could be taken, even the radical and long since abandoned one that if the rates will return *any* profit they must stand, the rates here in controversy were unreasonable and unjust, and to continue them in force would surely result in the confiscation of the appellant's plant.

Respectfully submitted.

JOHN D. WORKS,
G. WILEY WELLS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

San Diego Land and Town Company, *Appellant,*	
v.	
City of National City et al., *Appellees.*	

APPELLANT'S SUPPLEMENTAL BRIEF.

In our original brief, pages 19-24, we maintain that the Circuit Court erred in holding that there was no such thing as a water right, and that any contract therefor, must for that reason, be invalid. There were a number of cases decided by the Circuit Court involving this same question in which the same conclusion was reached. One of these was C. H. Souther *et al.*, *vs.* San Diego Flume Company, an action to rescind a contract for a water right, in which a cross bill was filed by the defendants seeking to enforce the same contract. This case was appealed to the United States Circuit Court of Appeals for the ninth circuit and was pending when our brief in this case was filed. Since

then the Court of Appeals has reversed the case and its opinion upholds, fully, and clearly, the ground of appeal in this court above mentioned. We file this supplemental brief for the sole purpose of calling the attention of the court to this late decision directly in point on this important question. And as it has not been reported we set out the opinion here in full. It is as follows:

"In the United States Circuit Court of Appeals, for the ninth circuit.

"San Diego Flume Company, appellant, *vs.*

"C H. Souther and W. S. Crosby, appellees.

"Before Gilbert and Morrow, Circuit Judges, and Hawley, District Judge.

"Gilbert, Circuit Judge:

"C. H. Souther and W. S. Crosby brought this suit against the San Diego Flume Company to cancel a written contract. It was alleged in the bill that the San Diego Flume Company, a corporation engaged in the business of furnishing water for irrigation and other purposes, made two certain contracts with the complainants, to furnish them water for the irrigation of their lands in San Diego county, California; that by each of said contracts the flume company was to furnish fifteen inches of water, continuous flow, measured under four-inch pressure; that the first contract was entered into on January 13, 1890, the second on March 12, 1890; that on or about June 7, 1894, the defendant, wrongfully, and without right, diverted from and deprived the complainants of more than one-half of the water so contracted to be furnished, and since said date and until December 8, 1894, refused to restore the said portion of said thirty inches of water; that such diversion of said portion of the water contracted for, deprived the complainants of water necessary for the irrigation of their said land, and injured and greatly damaged their trees, vines, and crops thereon, to their damage in the sum of $6500; that on October 2, 1894, the complainants rescinded the second of said contracts, on account of such refusal to deliver water as contracted for, but that the defendant denies that said contract is or was rescinded, and the complainants fear that if it is left outstanding, it will cause serious injury to them. The complainants alleged that they had fully complied with the contracts to be kept and performed by them, and prayed that the contract of March 12, 1890, be delivered up by the defendant, to be cancelled, and that the complainants recover from the defendant $2160 paid as interest on the principal specified in the contract of March 12, 1890, and that they recover the

further sum of of $6500 damages, and their costs. The defendant answered, denying that it wrongfully diverted water; and claimed its right to divert the same under the stipulation of the contract which provided that 'if its supply of water be at any time shortened, or its capacity for delivering the same impaired, by the act of God, or wilful injury to any part of its system of water works, the above described land, and the lands to which said water may be attached, shall, during the period of such shortage, be entitled to only such water as can be supplied to and for it after the full supply shall be furnished to all cities and towns that are or may be dependent, either in whole or in part, upon such system of water works for their supply of water;' that during the time mentioned in the bill, between June 7 and October 2, 1894, the supply of water was materially shortened by drouth and failure of the average rainfall, and they were unable to furnish the full amount of the water contracted for for that reason. The defendant then filed a cross bill, in which it was alleged that on March 12, 1890, in consideration of $9000, to be paid on or before five years from that date, with interest thereon from May 1, 1890, at six per cent per annum, payable annually, and in further consideration of semi-annual installments of the sum of $30 per annum for each miner's inch of water, for three years from May 1, 1890, and $60 per annum for each inch after May 1, 1893, the San Diego Flume Company granted a water right to fifteen inches of water, miner's measurement, under a four-inch pressure, to C. H. Souther and William S. Crosby for the lands which are described in the bill; and that it was further covenanted that the water to be furnished under the contract was intended to form a part of the appurtenances to said land, and that the flume company is bound by the contract to the owners of the land, and to all subsequent owners, to furnish the same, and that the covenants in the contract contained on the part of said Souther and Crosby should run with and bind the lands described. It was further alleged that on January 9, 1891, pursuant to the laws of California, more than twenty-five tax payers of the county of San Diego duly petitioned the board of supervisors of said county to fix and establish rates to be charged by the flume company as annual rental for water furnished and distributed by it to consumers; that due notice was given of said petition and the hearing thereof, as required by law, and that upon the hearing of the evidence relating thereto an ordinance was, on March 9, 1891, duly passed and adopted by said board of supervisors, fixing the annual rental at the sum of $120 per inch per annum; that thereby the rate agreed upon in the contract was abrogated and set aside, and the said Souther and Crosby became liable to pay the sum of $120 per inch per annum for the said

fifteen inches of water mentioned and contracted for in said contract. The cross bill further alleged that the contract had been in all things complied with on the part of the flume company, but that the other parties thereto had not performed their part of said agreement, and there was now due thereon the sum of $9000, with interest from May 1, 1894, and interest on the installment of interest falling due March 12, 1895, and the further sum of $900 annual rental for said fifteen inches of water for the six months succeeding December 1, 1894, and that said sums are a lien upon the real estate described in the bill. The prayer of the cross bill is that the contract be held a valid obligation; that the complainants in the cross bill recover from the defendants therein the said sum of $9000 with interest, and said sum of $900 annual rental, together with the costs of the suit, and the amount found due by the court to be declared a lien upon the real estate described in the contract; and that upon default of payment the land be sold under a decree of the court to satisfy the same. Upon the pleadings and the issues created testimony was taken and the cause submitted to the court. A decree was entered dismissing both the bill and the cross bill upon the ground that under the laws of California the San Diego Flume Company could not make a contract with any consumer of water, and that the contracts which were the subject of the suit were void. The complainants in the cross bill appealed from that portion of the decree which dismissed their cross bill, and contend that the court erred in holding that the contract was invalid. The appellees contend that both the bill and the cross bill were rightfully dismissed, not upon the ground that the contract was invalid, but upon the ground that the original bill of complaint stated no facts which would justify the relief prayed for. The question whether there is equity in the original bill is raised for the first time, so far as the record shows, on the appeal to this court. It will be first considered.

"The suit was brought to cancel a written instrument. In order to authorize the court to grant the relief prayed for, facts must be alleged which showed the necessity for the equitable interference of the court. In this case it is not alleged that the contract was procured by fraud or duress, or that it was entered into by the mistake of either party. No facts are shown in the bill or in the evidence, from which it may be inferred that the written contract is a menace to the complainants, or that there is danger that it may be used tortiously or oppressively by the defendant to their injury. In 2 Pom. Eq. Jur., Sec. 914, the principle governing this class of cases is thus stated: 'The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and

the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete.' In Globe Mutual Life Insurance Co. *v.* Reals, *et al.*, 79 N. Y. 202, it was said of the powers of a court of equity: 'Such a court will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable and which equity alone is able to avert.' Of similar import are the decisions in Ryerson *v.* Willis, 81 N. Y. 277; Johnson *v.* Murphy, *et al.*, 60 Ala. 288; Insurance Co. *v.* Bailey, 13 Wall. 616; Kimball *v.* West, 15 Wall. 377; Atlantic Delaine Co. *v.* James, 94 U. S. 207; Blake *v.* Pine Mountain Coal Co., 76 Fed. 624. Viewed in the light of the authorities, there was clearly no error in dismissing the complainants' bill. But it does not follow that the cross bill should have been dismissed. It is true that where the cross bill is merely defensive of the original bill, the dismissal of the latter carries with it the former. But a cross bill which avers additional facts and seeks affirmative relief—in other words, a cross bill which contains in itself all the necessary averments of an original bill—is not affected by the dismissal of the original bill. It remains for disposition as an original suit. 2 Barb. Ch. Pr., 128; Holgate *v.* Eaton, 116 U. S. 33; Chicago, etc. R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702; Ralls *v.* Ralls Admx., 82 Ill. 243; Wickliffe *v.* Clay, 1 Dana 585; Lowenstein *v.* Glidewell, 5 Dillon 329; Markell *v.* Kasson, 31 Fed. 104.

"The cross bill in this case is brought to foreclose a lien upon real estate. It presents a case of equitable cognizance, if the contract which creates the lien is a valid one. It becomes necessary, therefore, to determine whether the Circuit Court erred in ruling that under the constitution and statutes of California, a corporation created for the purpose of appropriating waters of the state and delivering the same for irrigation, is bereft of the power to enter into contracts with the consumers thereof. In article XIV, section 1, of the constitution, it is provided as following: 'The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be provided by law.' In section 2 of the same article is the following: 'The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.' In the Code of Civil Procedure, section 552, it is provided as follows: 'Whenever any corporation organized under the laws of

this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.' In 1885, Stats. of 1885, pp. 95–98, provision was made by statute authorizing the boards of supervisors of counties to fix and establish water rates upon petition of twenty-five citizens. 'Until such rates shall be so established (namely, those first established by the board), or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereafter furnish, appropriated waters for such rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legal rates thereof.'

"It becomes necessary at the outset to inquire what interpretation has been given to these provisions of the laws of California by the Supreme Court of that state. If it has become the settled law of the state that such contracts may be made and enforced by water companies and the consumers of water, the federal courts are bound to adopt the construction so established. Burgess *v.* Seligman, 107 U. S. 20; Gage *v.* Pumpelly, 115 U. S. 454; Norton *v.* Shelby County, 118 U. S. 425. In Claiborne County *v.* Brooks, 111 U. S. 400–410, Mr. Justice Bradley said: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state.' In the cases of Fresno Canal and Irrigation Company *v.* Rowell, 80 Cal. 114; Fresno Canal and Irrigation Company *v.* Dunbar, 80 Cal. 530; San Diego Flume Company *v.* Chase, 87 Cal. 561; and Clyne *v.* Benicia Water Company, 100 Cal. 310, the Supreme Court of California has recognized the validity of contracts between water companies and consumers. It is urged, however, against the binding force of these decisions, that in none of them was the question of the validity of contracts such as that involved in this case expressly raised, considered, or decided, and that in none of them did it appear that the water which was the subject of the controversy had been appropriated under

or by virtue of the constitution or laws of the state, or had otherwise become subject to the public use, declared by the constitution and laws of California. To this it may be said that in the case of Fresno Canal and Irrigation Company *v.* Dunbar, it is stated in the opinion of the court as follows: 'The respondent, the plaintiff in the court below, being a corporation engaged in diverting and supplying water for irrigation, entered into a contract with one Roeding, who was then the owner of a certain tract of land, by which the respondent sold to said Roeding, for the sum of $1200, a water right for said real estate.' The case of San Diego Flume Company *v.* Chase was one in which the appellant in the present suit was a party, and the contract under consideration in that case was similar to that which is now before this court for consideration. It was sought in that suit to reform a contract for the sale of a water right for irrigation purposes so as to limit the right to be taken thereunder by the defendant. The defendant answered the complaint and filed a cross-complaint for the purpose of obtaining specific performance of the contract. The court construed the contract, and by its judgment recognized its validity. It is not to be presumed that, in rendering these decisions, the Supreme Court of California was unmindful of the questions which are expressly raised in the present litigation. 'We are bound to presume that when the question arose in the state court, it was thoroughly considered by that tribunal, that the decision rendered embodied its deliberate judgment thereon.' Cross *v.* Allen, 141 U. S. 528-539. Nor is it important that in those cases the opinions are silent as to whether or not the companies obtained their water by appropriation of the waters of the state. In the case of Merrill *v.* South Side Irrigation Company, 112 Cal. 426, it was held that, when water is set apart and devoted to purposes of sale, rental, or distribution, it is 'appropriated' to those uses, and becomes subject to the public use declared by the constitution, without reference to its mode of acquisition. The court said: 'Had there been no allegations as to the objects of the corporation, the fact that it was engaged in the business of conducting and selling water for irrigation from its pipe constructed for that purpose would have been sufficient, under that branch of the case, to raise a presumption of authority so to do, and to impose upon it the legal liabilities arising therefrom.'

"It is suggested that the ruling of the Circuit Court finds support in the decision of the Supreme Court of California in the case of Price *v.* Riverside Land & Irrigation Company, 56 Cal. 431. In that case it was held that every corporation deriving its being from the act of May 14, 1862, 'to authorize the incorporation of canal companies and construction of canals,' has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class-

for whose alleged benefit it was created, and that if the rights of any consumer were denied, mandamus was the proper remedy. The court in that case said: 'The rates which the defendant may charge have never been fixed in the manner required by law, but defendant has itself fixed the rates, and could not be permitted to refuse water to one otherwise authorized to receive it, should he offer to pay those rates. It is not necessary to inquire whether, until the rates are fixed in the legal mode, the defendant could be compelled to furnish water to the extent of its capacity, free of charge.' It is the clear intimation of the opinion that if the plaintiff in that case had made an express demand for the water, with the offer to pay the rates which had been fixed by the defendant, he would have been entitled to the writ. What is the trend and purport of the decision of that case, and of the other decisions of the Supreme Court of the state of California to which reference has been made? They are to the effect that, notwithstanding the fact that the constitution declares that the use of waters of the state appropriated for irrigating purposes is a public use, and the further fact that, under the law of 1885, upon the petition of twenty-five consumers, the commissioners of the county may fix the rates to be charged by the company and paid by the consumer, nevertheless, until such rates are fixed in pursuance of law, the corporation furnishing the water and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreements will be sustained in the courts. In other words, there is no provision of the laws of the state, and no principle of public policy, which inhibits such contracts. Corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquire the water by appropriation of the waters of the state, or otherwise, are private corporations. They are nowhere declared to be public corporations or quasi-public. They conduct their business for private gain. For reasons affecting the public welfare, they are given the right of eminent domain, and in order that the use of the water may be fairly and equitably adjusted to consumers and their rights protected under the constitution, it is provided that in a certain contingence the rate to be paid by the consumer may be fixed in a manner prescribed by law. The use is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by the law in case the parties cannot agree. Said Mr. Justice Peckham, in Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112-158: 'The question, what constitutes a public use, has been before the courts in many of the states, and their decisions have not been harmonious,

the inclination of some of these courts being toward a narrower and more limited definition of such use than those of others.' It is suggested that a different interpretation of a similar constitutional provision has been adopted by the Supreme Court of Colorado in the case of Wheeler *v.* Northern Colorado Irrigating Company, 17 Pac. Rep. 487. In that case the court had under consideration the constitution of Colorado, which dedicates all unappropriated water in the natural streams in the state 'to the use of the people,' and vests the ownership thereof 'in the public.' By the constitution also the right to compensation for furnishing water is recognized, and provision is made for a judicial, or quasi-judicial, tribunal to fix an equitable maximum charge, where the parties fail to agree. A consumer of water instituted mandamus proceedings to compel a corporation created under the laws of that state to furnish the water for irrigation. The corporation had presented to the consumer for his signature a contract which contained the condition that he buy in advance 'the right to receive and use water,' paying therefor the sum of $10 per acre, and also that he further pay annually in advance, on or before the first day of May in each year, such reasonable rental per annum, not less than $1.50 nor more than $4.00 per acre, as may be established from year to year by the corporation. The court held the $10 section illegal, for the reason that the law did not authorize a corporation engaged in furnishing water for irrigation to sell a water right, but charged it with the public duty or trust of furnishing water to consumers upon receiving compensation for the service, since the water was dedicated to the public use and did not belong to the corporation. This was held in a case in which no contract had been entered into between the parties to the suit. The purport of the decision was, that the corporation had not such title in the water right that it could compel a consumer to buy, and that it could only exact an annual rate for its service in delivering the water. There is no intimation in the language of the opinion, nor does it follow from the decision, that a contract deliberately entered into between the corporation and a consumer would not have been held valid and binding by the court.

"The allegation in the cross bill that on January 9, 1891, proceedings were commenced under the law of 1885 to fix the annual rental which the flume company might exact for water furnished to consumers, and that in pursuance thereof, the rate was fixed at $120 per inch per annum, and that the ordinance so established is still in force, was met by the appellees, who answer denying that the enactment of said ordinance had abrogated or set aside the contract of March 12, 1890, or that they had ever become liable to pay the rate

established by the ordinance. It appears from the pleadings and from the evidence that neither of the parties to this suit deemed the rate so fixed by ordinance applicable to them, but continued to recognize the contract of March, 1890, as controlling their dealings, the one with the other. It is evident that the appellees considered the rate established by the contract more advantageous to them than the rate fixed by the ordinance, and that the appellant was content to rely upon the contract. In the cross bill no attempt is made to assert rights under the ordinance. The prayer of the bill is confined to petitions for relief under the contract. The questions whether the contract has been rescinded by the parties thereto, or, if not rescinded, whether damages have been sustained through its breach, are properly cognizable as matters of defense to the cross bill.

"The decree dismissing the cross bill will be set aside, and the cause remanded to the Circuit Court for further proceedings in accordance with the foregoing views.

"(Endorsed.)

"Opinion filed October 3, 1898.

"F. D. MONCKTON, *Clerk*,

"By MEREDITH SAWYER, *Deputy Clerk*."

We respectfully submit that this case should be regarded as decisive of this case as it is directly in line with the decisions of the State Supreme Court on the subject cited in the opinion.

Respectfully submitted.

JOHN D. WORKS,
G. WILEY WELLS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellant.